

June 13, 2011

The Honorable Patrick J. Leahy
Chairman
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Charles E. Grassley
Ranking Member
U.S. Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

2011 JUN 17 AM

Dear Chairman Leahy and Ranking Member Grassley:

More than three years ago, the U.S. Supreme Court unanimously found in *Medellin v. Texas* that there are "plainly compelling" reasons for Congressional implementation of the United States' consular treaty commitments, by providing access to judicial review in certain cases of foreign nationals who were deprived by the arresting authorities of their right to seek consular assistance. The Court observed that the reasons for meeting these international obligations included "ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law." Representing the rights and concerns of the millions of American citizens who live overseas, we wholeheartedly agree with the Supreme Court's assessment that full compliance would "vindicate United States interests" and help to ensure that our citizens detained abroad continue to receive prompt access to consular protection. We are therefore writing to renew our support for rapid Congressional action to address this very significant issue.

In an *amicus curiae* brief submitted to the Supreme Court in the *Medellin* case, our organizations joined with other concerned Americans in pointing out that a failure by the United States "to give full effect to the rights and protections of the Vienna Convention on Consular Relations" would "weaken the international framework of reciprocal rights and obligations essential to U.S. consular assistance to its citizens, endangering the welfare of Americans abroad." International events over the past three years have amply confirmed those concerns. Just days ago, for example, an Iranian foreign ministry spokesperson responded to the United States' request for immediate consular access to two young American hikers on trial in Iran by asserting that Iranian nationals arrested by U.S. authorities "have neither consular access nor contact with their families."¹ Whether accurate or not, this statement illustrates the urgent need to remove any doubts that the United States will lead by example and remedy prejudicial Vienna Convention violations in cases where very severe sentences were imposed.

Several years have passed without fulfillment of the U.S. commitment to provide review of its Vienna Convention breaches in the cases addressed by the *Avena* decision of the International Court of Justice. At the same time, the State Department continues to instruct U.S. consular officers that their "most important function is to protect and assist private U.S. citizens or nationals traveling or residing abroad" and that "few of our citizens need that assistance more than those who have been arrested in a foreign country or imprisoned in a foreign jail."² In our view, sustaining the essential consular function of protecting overseas Americans is made more

¹ Agence France Presse, *Iran Refuses to Improve Access to Jailed US Hikers*, May 24, 2011.

² U.S. Department of State, 7 Foreign Affairs Manual §412, *Policy*.

uncertain with each day that passes without rectifying the United States' failure to fully practice at home what it rightly insists upon abroad.

Our organizations believe that Congress can effectively fulfill the United States' international obligations by promptly adopting legislation ensuring access to judicial review and reconsideration of Vienna Convention violations in the most serious cases. Any burden on the federal courts would be minimal, and would be greatly outweighed by the benefits of protecting the reciprocal rights of American citizens abroad.

We are confident that you share our concerns and are working diligently to address them. Please be assured of our continuing support for your efforts, and we look forward to the introduction and passage of this vitally important legislation at the earliest possible opportunity.

Sincerely yours,

John Flint, President
Association of Americans Resident Overseas (AARO)

Lucy Stensland Laederich, U.S. Liaison
FAWCO (Federation of American Women's Clubs Overseas, Inc.)

Marylouise Serrato, Executive Director
American Citizens Abroad (ACA)

Andy Sundberg, Secretary
Overseas American Academy

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June 14, 2011

The Honorable Patrick J. Leahy
Chairman
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224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Charles E. Grassley
Ranking Member
U.S. Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

2011 JUN 17 AM
7:00:14 PM

Dear Chairman Leahy and Ranking Member Grassley:

We, the undersigned, write to urge your strong support for the Consular Notification Compliance Act, S.1194, legislation introduced today by Chairman Leahy that would provide for review in capital cases involving foreign nationals who did not receive consular access while in U.S. law enforcement custody as required by the Vienna Convention on Consular Relations (VCCR). This legislation would ensure the reliable and accurate functioning of our domestic criminal justice system; give assurance and leadership to the international community regarding the commitment of the United States to the rule of law, thus protecting the interests and safety of our own citizens abroad; and bring the United States into compliance with its undisputed legal obligations pursuant to the International Court of Justice's (ICJ) decision in *Avena and Other Mexican Nationals*.

As you are well aware, millions of Americans rely on their right to consular assistance when traveling, serving in the military, working, and studying abroad. When needed, consular access helps guide Americans through foreign and, often times, complicated legal systems, safeguards our fundamental human and civil rights, and ensures overall protection for our citizens. For the U.S. to request compliance with the VCCR agreement from other countries, we must offer the same rights afforded to foreign nationals detained here in the United States.

Both at home and abroad, prompt access to consular assistance safeguards the fundamental human and legal rights of foreigners who are arrested and imprisoned. For that reason alone, it is essential that the United States lead by example and provide meaningful remedies for VCCR violations, especially in the most serious of cases. In addition, any further delay in compliance with *Avena* will leave the international community with the perception that the United States ignores its binding legal commitments. This is dangerous on many levels: it erodes our reputation as a reliable treaty partner; undermines the effectiveness of international mechanisms for the peaceful settlement of disputes; and, as mentioned above, could have a harmful impact on the millions of U.S. citizens who travel, live, or work abroad. As the State Department conceded more than a decade ago in an apology to Paraguay for the U.S.'s failure to comply with the VCCR in a case that resulted in the execution of a Paraguayan national, the United States "must see to it that foreign nationals in the United States receive the same treatment that we expect for our citizens overseas. We cannot have a double standard."

The U.S.'s inaction on implementing the judgment of the ICJ endangers our citizens, harms the U.S.'s standing in the international community and clashes with our fundamental civil rights and

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values as a nation. We trust that this Congress will take this issue under serious advisement, and we urge you to pass S.1194 promptly in order to implement our obligation as soon as possible. The longer we wait to comply with this important agreement, the more danger we pose for our citizens living and traveling abroad and for the integrity of our own justice system. We thank you for your time and attention to this important matter, and we look forward to working with you in the near future.

Sincerely,

Amnesty International USA

Human Rights First

The Constitution Project

National Association of Criminal Defense Lawyers

Human Rights Defense Center

Justice Now

The Advocates for Human Rights

Safe Streets Arts Foundation

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THE CONSTITUTION PROJECT



Safeguarding Liberty, Justice & the Rule of Law

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*All names listed for
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June 14, 2011

The Honorable Patrick Leahy
Chair, U.S. Senate Committee on the Judiciary
127 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Charles Grassley
Ranking Member, U.S. Senate Committee on the Judiciary
135 Hart Senate Office Building
Washington, DC 20510

RE: Consular Notification Compliance Act, S.1194

Dear Chairman Leahy and Ranking Member Grassley:

As president of the Constitution Project, I write in support of the Consular Notification Compliance Act (S.1194). This legislation would provide foreign nationals currently on death row the opportunity to seek judicial review of violations of their right to consular notification and access under the Vienna Convention on Consular Relations (VCCR) that occurred while in law enforcement custody. Additionally, the legislation would provide for review and appropriate remedies in future cases in which violations of the right to consular access allegedly occurred, if the foreign national is facing capital charges in a U.S. court.

The Constitution Project is a nonprofit organization in Washington, D.C., that promotes and defends constitutional safeguards through constructive dialogue across ideological and partisan lines. Its Death Penalty Committee, a list of members of which is attached as Appendix A, is a bipartisan, blue-ribbon Committee that comprises supporters and opponents of the death penalty, Democrats and Republicans, conservatives and liberals. Committee members are united in their profound concern that, in recent years, and around the country, procedural safeguards and other assurances of fundamental fairness in the administration of capital punishment have been revealed to be deeply flawed. Among these flaws is the continued failure of the United States to abide by the decision of the International Court of Justice (ICJ) in *Avena and Other Mexican Nationals* (*Aveno*) requiring the U.S. to honor the safeguards of consular notification and access, pursuant to the VCCR.

In 2005, the Death Penalty Committee published *Mandatory Justice: The Death Penalty Revisited*,¹ a consensus report that offered 32 recommendations to assure that all capital defendants are afforded basic constitutional and procedural protections, including competent

¹ Available at <http://www.constitutionproject.org/manage/file/30.pdf>.

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counsel, a fair trial, and full judicial review of the conviction and sentence. Among those recommendations is a call for the enforcement of the VCCR and its consular notification obligations. As *Mandatory Justice* makes clear, the policy considerations behind consular notification rights are similar to those behind the right to counsel guaranteed by the U.S. Constitution, in that both are designed to protect an individual's legal rights and prevent mistreatment. Moreover, consular officers can provide critical support, particularly in capital cases, by quickly securing counsel, locating witness who may be critical at the guilt and sentencing stages of the criminal trial, and providing expert and investigation resources.

Unfortunately, as *Mandatory Justice* notes, "the *Avena* case and cases brought by other countries suggest disturbingly that death rows across the United States house foreign nationals whose consular rights were violated but who may never have received assistance from their consular officers...² Arrested foreign nationals rarely, if ever, invoke their consular rights without notification. As Justice Stevens noted... 'It surely is reasonable to presume that most foreign nationals are unaware of the provisions of the Vienna Convention That is precisely why the Convention places the notice obligation on the governmental authorities.'"³

By allowing for meaningful review of violations of consular rights under the VCCR, S.1194 will encourage the fair treatment of foreign nationals in law enforcement custody, and help to encourage other countries to honor their consular notification obligations. This is critical in protecting the millions of U.S. citizen who travel, live, work, or serve our military abroad, because a key component to enforcing the VCCR abroad is the U.S.'s commitment to honoring its obligations under the agreement domestically.

I hope you find this information helpful in your deliberations, and I urge you to support the Consular Notification Compliance Act. Thank you for your consideration.

Sincerely,



Virginia Sloan
President

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² See The International Justice Project, Current Cases and Past Cases, available at www.internationaljusticeproject.org.

³ *Torres v. Mullin*, 124 S. Ct. 919 (2003) (opinion of Stevens, J., respecting the denial of the petition for certiorari).

APPENDIX A

CONSTITUTION PROJECT DEATH PENALTY COMMITTEE

Co-Chairs

Gerald Kogan

Former Chief Justice, Supreme Court of the State of Florida; former Chief Prosecutor, Homicide and Capital Crimes Division, Dade County, Florida

Mark White

Chairman, Geovox Security, Inc.; Governor of Texas, 1983-1987; Attorney General of Texas, 1979-1983; Secretary of State of Texas, 1973-1977; Partner, Reynolds, White Allen & Cook, 1969-1973; Assistant Attorney General of Texas, 1965-1969

Beth A. Wilkinson

Prosecutor, Oklahoma City bombing case

Members

Harry Barnes, Jr.

Former United States Ambassador to Romania, India, and Chile

Bob Barr

Former Georgia Congressman (R-GA)

David I. Bruck

Clinical Professor of Law and Director, Virginia Capital Case Clearinghouse, Washington and Lee University School of Law

O.H. Eaton, Jr.

Judge, 18th Judicial Circuit of Florida, 1986-2010

James A. Fry

James A. Fry, P.C. 1982-present; Assistant District Attorney, Dallas County, Texas 1980-1982; Former Chairman, Texas State Bar Grievance Committee

John J. Gibbons

Director and Founder, John J. Gibbons Fellowship in Public Interest and Constitutional Law, Gibbons PC; Former Chief Judge of the United States Court of Appeals, Third Circuit

Charles A. Gruber

Chief of Police, South Barrington Police Department; Former President, International Association of Chiefs of Police; Former President, Illinois Association of Chiefs of Police

Dr. David P. Gushee

Distinguished University Professor of Christian Ethics and Director, Center for Theology and Public Life, Mercer University

Asa Hutchinson

Senior Partner, Asa Hutchinson Law Group; Undersecretary, Department of Homeland Security, 2003-2005; Administrator, Drug Enforcement Administration, 2001-2003; Member of Congress (R-AR), 1997-2001; United States Attorney, Western District of Arkansas, 1982-1985

Cardinal William H. Keeler

Archbishop of Baltimore

Peter D. Keisler

Partner, Sidley Austin LLP; Acting Attorney General, Assistant Attorney General for the Civil Division, Principal Deputy Associate Attorney General, and Acting Associate Attorney General of United States Department of Justice, 2002-2007

Paula M. Kurland

Victim Advocate; Founding Member, Bridges to Life (a victim-offender program in Texas); Mother of Murder Victim

APPENDIX A

Abner J. Mikva
Schwartz Lecturer and Senior Director,
Mandel Legal Aid Clinic, University of
Chicago Law School; Former Member of
Congress (D-IL), White House Counsel, and
Chief Judge, United States Court of Appeals
for the DC Circuit

Sam D. Millsap, Jr.
Former District Attorney, Bexar County, San
Antonio, Texas

Dr. LeRoy Riddick
Forensic Pathologist

Chase Riveland
Former Secretary, Department of
Corrections, State of Washington

David A. Schwartz
President & CEO, DS Baseball LLC

William S. Sessions
Partner, Holland & Knight, LLP; former
Director, Federal Bureau of Investigation;
former Chief Judge, United States District
Court for the Western District of Texas

G. Elaine Smith
Former President, American Baptist
Churches, United States of America

B. Frank Stokes, Jr.
Special Agent, Federal Bureau of
Investigation, Retired; Private Investigator

Jennifer Thompson-Cannino
Spokesperson, Center on Wrongful
Convictions

Scott Turow
Partner, SNR Denton; Author

John W. Whitehead
President, The Rutherford Institute

Dr. Reginald Wilkinson
President & CEO, Ohio College Access
Network

Rabbi Eric H. Yoffie
President, Union for Reform Judaism

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June 03, 2011

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224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Charles E. Grassley
Ranking Member
U.S. Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

JUN 11 2011

Dear Chairman Leahy and Ranking Member Grassley:

As you may know, while on assignment for Current TV my colleague, Laura Ling, and I were arrested by North Korean soldiers for crossing the frozen Tumen river, which separates the Republic of China and North Korea. We were held, as prisoners, isolated from one another, for four and a half months. We were repeatedly interrogated, and eventually put on trial and sentenced to twelve years hard labor. It was only through the extraordinary efforts of the Department of State and former President Bill Clinton that we were pardoned and allowed to return home.

The sense of darkness in the first week in North Korean captivity was unbearable. My biggest fear was nobody knowing where I was or what had happened to me. By the middle of the second week, through the hard work of the Swedish Ambassador pointing out to North Korea its responsibilities under the Vienna Convention, I was able to sit down with him. The Swedish Ambassador represented the interests of the United States in North Korea. It was a very short meeting but the significance of the meeting is hard to describe in words. I can only mention the sense of security I had, knowing that someone other than North Korea was monitoring my case. I believe the prompt consular access protected me from any mistreatment by my captors. Later on I was allowed to meet with him three more times. The meetings were my only communication with the US government and to let them know my situation and for me to find out how my family was doing. I know the importance of having consular access, as demanded by the Vienna Convention on Consular Relations.

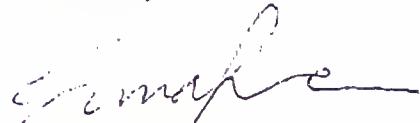
The United States has always been on the forefront on human rights issues. People look to the US as a watchdog for human rights violations around the globe. We should not allow the Vienna Convention violation in our backyard. We ask the world to treat our citizens with respect when they are detained in other countries and demand that they have consular access regardless if its our Ambassador or one that represents our interest. We also have to live by those standards.

It is hard to imagine the importance of meeting a friendly face in a place of isolation and darkness until you are in that situation. To know that someone is there monitoring your case and helping to keep you and your family informed of the situation is beyond words. Having consular access has nothing to do with the verdict or sentence of a trial but it is a little light of hope that you have a chance at a fair trial.

From this very personal experience and point of view, I am writing to urge your full support for legislation that would provide access to judicial review of consular notification violations.

I believe that swift action by Congress to rectify our nation's own consular treaty violations is absolutely essential to prevent the further erosion of this universal safeguard. I also firmly believe that the potential risks of inaction are simply too serious to ignore. For every endangered American hidden in a foreign prison—and for their fearful families back at home—there can be no more important priority than upholding the reciprocal right to consular protection.

Sincerely,



Euna Lee

2011 JULY 17 AM 9:59

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June 14, 2011

The Honorable Patrick J. Leahy
Chairman
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224 Dirksen Senate Office Building
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The Honorable Charles E. Grassley
Ranking Member
U.S. Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

Re: The Consular Notification Compliance Act

Dear Chairman Leahy and Ranking Member Grassley:

As former U.S. diplomats and State Department officials, we write to urge your support for the Consular Notification Compliance Act, legislation that we believe is vitally important to meeting the United States' foreign policy objectives and to protecting the interests of its citizens abroad. We urge you to act promptly to enact this legislation that would secure compliance with the United States' binding treaty obligations by providing a review mechanism for the cases of foreign nationals who - without the benefit of timely consular notification and access - were convicted and received death sentences.

Each year, thousands of Americans are detained abroad. Prompt knowledge of and access to our fellow-citizens held in foreign jails ensures that U.S. consular officers can help them obtain legal assistance, monitor their treatment, and connect them to family and friends back home. This crucial lifeline of consular support can only function effectively if the detaining authorities comply with their obligations under Article 36 of the Vienna Convention on Consular Relations, which grants all foreigners in custody the right to consular notification, communication and access "without delay." Insisting on compliance with and protesting violations of Article 36 provisions has thus long been an integral element of the U.S. policy of providing protective consular services to detained Americans overseas.

For instance, when three Americans were detained after accidentally crossing an unmarked border into Iran in 2009, a State Department spokesperson insisted that "Iran has obligations under the Vienna Convention, and we demand consular access at the first opportunity."¹ The Secretary of State later called on the Iranian government "to live up to its obligations under the Vienna Convention by granting consular access and releasing these three young Americans

¹ U.S. Department of State, Daily Press Briefing (Aug. 10, 2009), at <http://www.state.gov/r/pa/prs/dpb/2009/aug/127210.htm>.

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without further delay."² Once consular access was finally granted, the State Department "welcome[d] the fact that Iran is meeting up to its obligations under the Vienna Convention".³

Unfortunately, the United States has sometimes violated Article 36 requirements even as we call on foreign governments to comply with its terms. In 2004, the International Court of Justice (ICJ) determined that some fifty Mexican nationals were entitled to judicial hearings to determine if Article 36 breaches, which were proven to have occurred, affected the fairness of their capital murder convictions and/or sentences. The United States is required by the U.N. Charter to comply with decisions of the ICJ. President George W. Bush attempted to enforce this decision at the state court level, but the U.S. Supreme Court later ruled in *Medellín v. Texas* that only Congress could ensure compliance by adopting legislation providing for the compulsory review and reconsideration mandated by the ICJ. The Supreme Court also observed that the ICJ decision undeniably bound the United States under international law and that "plainly compelling" reasons existed for its domestic implementation. "In this case," the *Medellín* Court noted, "the President seeks to vindicate United States interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law."

Clearly, the safety and well-being of Americans abroad is endangered by the United States maintaining the double standard of protesting denials of consular notification and access to its own citizens while simultaneously failing to comply with its obligation to remedy identical violations. We cannot realistically expect other nations to continue to comply with consular treaty commitments that we refuse to uphold. For that reason alone, it is essential that Congress act swiftly to provide the limited procedural remedy that both our Executive and Judicial Branches have so clearly indicated is in the national interest.

As the Supreme Court pointed out, however, the United States' interest in implementing these international obligations goes beyond protecting the reciprocal rights and safety of its overseas citizens. Our national security, effective commercial and trade relations relating to our prosperity and almost every matter of national interest, large and small, is covered by reciprocal treaty obligations. We risk jeopardizing these interests if we practice an indifference to these obligations in this or other arenas. We believe that continued non-compliance will surely alienate this nation from its allies. We also believe that any further failure to provide the modest remedy of "review and reconsideration" required in these cases will undermine America's credibility as a global champion of the rule of law, thereby seriously hindering our foreign policy objectives. It is worth noting the United States agreed to be bound by the ICJ's decision both before and after the case was heard and has consistently advised multiple international and domestic courts that it is doing everything within its power to comply with this decision. Passing

² U.S. Secretary of State, Missing and Detained Americans in Iran, Aug. 15, 2009, at <<http://www.state.gov/secretary/rm/2009a/08/127948.htm>>.

³ U.S. Department of State, Daily Press Briefing (Sept. 29, 2009), at <<http://www.state.gov/r/pa/prs/dpb/2009/sept/129970.htm>>.

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legislation to ensure our nation's compliance needs to be accomplished in order to make good on this representation.

The ability of the United States to secure future international agreements vital to our commercial interests and national security depends largely on whether this nation is perceived as honoring its international obligations. It is vitally important for Congress to mandate judicial enforcement of America's treaty obligations. Anything less jeopardizes our global reputation as a dependable treaty partner. We therefore urge you to support the rapid passage of the Consular Notification Compliance Act to accomplish this end, and thank you for your attention to this important matter.

Sincerely,

Harry Barnes, Jr.
U.S. Ambassador to Chile, 1985-1988; U.S. Ambassador to India, 1981-1985; Director General of the Foreign Service 1977-1981; U.S. Ambassador to Romania, 1974-1977

John B. Bellinger, III
Partner, Arnold & Porter LLP; Legal Advisor to the Department of State, 2005-2009; Legal Advisor to the National Security Council, 2001-2005

David E. Birenbaum
Of Counsel, Fried, Frank, Harris, Shriver & Jacobson LLP; Senior Scholar, Woodrow Wilson International Center for Scholars; U.S. Ambassador to the UN for UN Management and Reform, 1994-96

James R. Jones
U.S. Ambassador to Mexico, 1993-1997; Member of U.S. Congress (D-OK), 1973-1987

David Charles Miller, Jr.
Special Assistant to the President, National Security Council, 1989-1990; U.S. Ambassador to Zimbabwe, 1984-1986; U.S. Ambassador to Tanzania, 1981-1984

Thomas R. Pickering
Undersecretary of State for Political Affairs, 1997-2000; U.S. Ambassador and Representative to the United Nations, 1989-1992

William H. Taft, IV
Legal Advisor, U.S. Department of State, 2001-2005; U.S. Ambassador to NATO, 1989-1992

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REAR ADMIRAL DON GUTER, USN (RET.)
REAR ADMIRAL JOHN D. HUTSON, USN (RET.)
BRIGADIER GENERAL JAMES P. CULLEN, USA (RET.)
BRIGADIER GENERAL DAVID R. IRVINE, USA (RET.)
BRIGADIER GENERAL MURRAY G. SAGSVEEN, USA (RET.)
COLONEL LAWRENCE B. WILKERSON, USA (RET.)

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The Honorable Charles E. Grassley
Ranking Member
U.S. Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

2011 JUN 17 1019:59

Re: The Consular Notification Compliance Act

Dear Chairman Leahy and Ranking Member Grassley:

We write to urge you to support prompt passage of the Consular Notification Compliance Act, legislation that would give domestic legal effect to U.S. obligations under the Vienna Convention on Consular Relations (Vienna Convention) to provide consular access to foreign nationals in U.S. law enforcement custody by providing for judicial review of certain claims that this obligation has not been satisfied. International consular notification and access obligations are essential to ensuring humane, non-discriminatory treatment for both non-citizens in U.S. custody and U.S. citizens in the custody of foreign governments. As retired military leaders, we understand that the preservation of consular access protections is especially important for U.S. military personnel, who when serving our country overseas are at greater risk of being arrested by a foreign government.

U.S. military personnel are at risk for being taken into foreign custody after accidental incursions into foreign territories, while on leave or furlough, or while stationed abroad pursuant to, or in absence of a Status of Forces Agreement (SOFA).¹ When American military personnel or their family members find themselves in foreign custody, consular access is indispensable in allowing the U.S. government to fulfill its duty to ensure fair and humane treatment for such individuals.

For example, in 2001 when a U.S. Navy surveillance plane made an emergency landing in Chinese territory after colliding with a Chinese jet, the State Department cited the Vienna Convention and other consular treaties in demanding immediate access to the plane's crew. Chinese authorities responded by granting consular visits to the crew members, who were detained in China for 11 days.² Moreover, military regulations implementing SOFA requirements anticipate that consular officers will assist the designated commanding officer in key areas such as protesting inhumane treatment and ensuring that the individual has access to an adequate defense.³

¹ R. Chuck Mason, *Status of Forces Agreement (SOFA): What Is It, and How Has It Been Utilized?* Congressional Research Service, June 18, 2009.

² China declines U.S. search offer, April 3, 2001, <http://edition.cnn.com/2001/WORLD/asiapac/cast/04/02/chinaaircollision.08/>.

³ See generally Army Regulation 27-50, Status of Forces Policies, Procedures, and Information (15 December 1989), available at www.army.mil/usapa/epubs/pdf/r27-50.pdf.

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The strength of consular access protections for U.S. military personnel abroad is dependent on the United States' reciprocal commitment to fulfill its obligations at home.⁴ But given the Supreme Court's 2008 decision in *Medellin v. Texas*, the executive branch is unable, without further action by Congress, to enforce certain consular protections under the Vienna Convention with regards to U.S. state law enforcement personnel.⁵ In light of the *Medellin* decision, additional legislation is needed to ensure the integrity of the consular notification and access rights upon which U.S. service members rely.

Legislation to ensure review and appropriate relief if needed when a foreign national faces or is sentenced to death, while relatively limited in scope, would improve foreign governments' confidence in the United States' ability to uphold its consular access obligations, making it more likely that such governments will grant this access to Americans in their custody.

Improving U.S. enforcement of its consular notification and access legal obligations will help protect American citizens detained abroad, including U.S. military personnel and their families stationed overseas. We urge you to support those who are serving our country overseas by ensuring swift passage of the Consular Notification Compliance Act to meet our international responsibilities.

Sincerely,

Rear Admiral Don Guter, USN (Ret.)
Rear Admiral John D. Hutson, USN (Ret.)
Brigadier General James P. Cullen, USA (Ret.)
Brigadier General David R. Irvine, USA (Ret.)
Brigadier General Murray G. Sagsveen, USA (Ret.)
Colonel Lawrence B. Wilkerson, USA (Ret.)

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⁴ See John Bellinger, Lawlessness North of the Border, *New York Times*, July 18, 2009.

⁵ President George W. Bush, Memorandum for the Attorney General (Feb. 28, 2005).

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Washington, DC 20510

Dear Chairman Leahy and Ranking Member Grassley:

We are writing to urge your support for quick passage of the Consular Notification Compliance Act, legislation that would allow foreign nationals who were denied consular access while in law enforcement custody and face the death penalty to receive appropriate review of that failure. As former prosecutors and judges, we are strong supporters of a robust and accurate criminal justice system. We are well aware that international consular notification and access, as required under the Vienna Convention on Consular Relations (Vienna Convention), is essential to such a system, and to ensuring non-discriminatory treatment for both non-citizens in U.S. custody and U.S. citizens in the custody of foreign governments. It is also critical to the efficient, effective, and fair operations of criminal justice systems throughout the United States.

It is appropriate to ensure that our country complies with the laws to which it has obligated itself, and to ensure that those laws apply to our own citizens as well. At all stages of the proceedings, foreign nationals—whether our own citizens in other countries or those from other countries in the United States—face unique disadvantages and challenges when confronted with prosecution and imprisonment under the legal system of another nation. Prompt consular access ensures that they have the means necessary to be advised of their rights and to prepare an adequate defense.

Ensuring prompt consular access to foreigners arrested in the United States also enhances the truth-seeking function that lies at the heart of American justice. Much in the same way as the right to counsel under the Sixth Amendment, consular notification is essential to enabling fair access for those who are unfamiliar with our legal system. As Chief Judge Juan Torruella of the United States Court of Appeals for the First Circuit observed, "Without [consular access], I think that we presume too much to think that an alien can present his defense with even a minimum of effectiveness. The result is injury not only to the individual alien, but also to the equity and efficacy of our criminal justice system." *U.S. v. Li*, 206 F.3d 56, 78 (1st Cir. 2000) (Torruella, C.J., concurring in part and dissenting in part).

Consular assistance provides a unique and indispensable protection for foreign nationals who are unfamiliar with the U.S. criminal justice system. This is true with regard to our own citizens abroad as well. As many domestic courts have recognized, consulates can provide essential resources that are simply not available through other means, particularly in identifying and explaining the ways in which the U.S. criminal justice system differs from their native systems.

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Early consular access can prevent misunderstandings and missteps by a foreign national that might otherwise prejudice their ability to obtain a fair trial. Consulates can assist defense counsel in locating crucial documents, witnesses, and exonerating evidence available only in their native country and can assist in translations that in too many cases have been demonstrated to be erroneous, thus jeopardizing the accuracy of the proceedings. This can mean the difference between conviction and acquittal, or between life and death.

We want to emphasize that demonstrating our nation's commitment to complying with Vienna Convention obligations is also critical to ensuring the safety of *Americans* traveling, living and working abroad. The United States expects countries to grant consular notification and access to Americans in law enforcement custody. In return we pledge to accord the same right to foreign nationals within our borders. In addition, particularly in states bordering Mexico and Canada, cooperation between law enforcement agencies is critical to ensuring the safety of citizens on all sides of the border. These accords are threatened when the United States erects procedural hurdles that prevent foreign nationals from obtaining meaningful judicial review when denied consular notification and access and may well mean that our own citizens' rights will be jeopardized in countries whose citizens' rights have not been respected by the United States.

The Consular Notification Compliance Act will allow U.S. federal courts to review claims of individuals facing death sentences, ensuring that violations of the Vienna Convention have not resulted, or will not result, in actual prejudice to the criminal conviction or sentence. While appropriately limited in scope to Vienna Convention claims, passage of this legislation will demonstrate to foreign governments the United States' good faith in upholding its consular access obligations, increasing the likelihood that foreign governments will grant access to Americans in their custody.

Providing meaningful enforcement of the Vienna Convention's consular notification and access requirements will increase the efficient, effective and fair operations of our criminal justice system and protect U.S. citizens abroad. For these reasons, we urge you to support the Consular Notification Compliance Act and to ensure its prompt progress and passage in Congress.

Respectfully,

Hon. Charles F. Balrd, Former Judge, Texas Court of Criminal Appeals; Former Judge, 299th District Court of Travis County, Texas

Hon. William G. Bassler, Former Judge, United States District Court for the District of New Jersey (1991-2006); Former Judge, Superior Court of New Jersey (1988-1991)

A. Bates Butler III, United States Attorney, District of Arizona (1980-81); First Assistant United States Attorney, District of Arizona (1977-80)

Robert J. Del Tufo, Attorney General, State of New Jersey (1990-1993); United States Attorney, District of New Jersey (1977-1980); Former First Assistant State Attorney General and Director of New Jersey's Division of Criminal Justice

W. Thomas Dillard, United States Attorney, Northern District of Florida (1983-1986); United States Attorney, Eastern District of Tennessee (1981)

Hon. Bruce J. Elinhorn, Former United States Immigration Judge (1990-2007); Special Prosecutor and Chief of Litigation, United States Department of Justice Office of Special Investigations (1979-1990)

Hon. Shirley M. Hufstedler, United States Secretary of Education (1979-1981); Former Judge, United States Court of Appeals for the Ninth Circuit (1968-1979); Former Associate Justice, California Court of Appeal (1966-1968); Former Judge, Los Angeles County Superior Court (1961-1966)

Hon. John J. Gibbons, Former Judge, United States Court of Appeals for the Third Circuit (1970-1990) (Chief Judge (1987-1990))

Hon. Nathaniel R. Jones, Former Judge, United States Court of Appeals for the Sixth Circuit, (1979-2002); Assistant United States Attorney, Northern District of Ohio (1962-1967)

Hon. Gerald Kogan, Former Chief Justice, Supreme Court of the State of Florida; Former Chief Prosecutor, Homicide and Capital Crimes Division, Dade County, Florida

Kenneth J. Michell, United States Attorney, Northern District of Texas (1977-1981); Assistant United States Attorney, Northern District of Texas (1961-1977)

Hon. Stephen M. Orlofsky, Former Judge, United States District Court for the District of New Jersey (1995-2003); Magistrate Judge, United States District Court for the District of New Jersey (1976-1980)

Professor Mark Osler, Professor of Law, University of St. Thomas, Minnesota; Former Professor of Law, Baylor University, Texas; Former Assistant United States Attorney, Eastern District of Michigan

H. James Pickerstein, United States Attorney, District of Connecticut (1974); Chief Assistant United States Attorney, District of Connecticut (1974-1986)

Richard J. Packer, United States Attorney, District of Nevada (1989-1990)

James H. Reynolds, United States Attorney, Northern District of Iowa (1976-1982)

Hon. William S. Sessions, Director of the FBI (1987-1993); Former Judge, United States District Court for the Western District of Texas (1974-1987) (Chief Judge (1980-1987)); United States Attorney, Western District of Texas (1971-1974)

John Van de Kamp, Attorney General of California (1983-1991); District Attorney of Los Angeles County (1975-1983)

Mark White, Governor of Texas (1983-1987); Attorney General, State of Texas (1979-1983); Secretary of State of Texas (1973-1977); Assistant Attorney General, State of Texas (1965-1969)

Hon. Michael Zimmerman, Former Justice, Supreme Court of Utah (1984-2000) (Chief Justice (1994-1998))

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